Supreme Court, U.S.
FILED

(1)

No. 02 150 JUL 15 2002

OFFICE OF THE CLERK

In The

Supreme Court of The United States

October Term, 2002

ELIEZER CHAJMOVICZ,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT E. SOKOLSKI
Attorney for Petitioner
305 Broadway - Suite 402
New York, New York 10007
(212) 571-4090

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (9295)

40 pp

QUESTIONS PRESENTED

1. Whether a federal sentencing court violates a criminal defendant's Due Process rights by failing to resolve or affirmatively disregard objections to inaccurate or unreliable information in a Presentence Investigation Report before proceeding to sentencing?

2. Whether the prosecution must demonstrate all of the elements of a defendant's "relevant conduct" in order for the federal sentencing court to increase the defendant's offense level based upon such conduct?

3. Whether the prosecution sustains its burden to prove that a defendant was a "supervisor" to several individuals he "recruited" for importation of a controlled substance, where there was no evidence presented that Defendant, *inter alia*, was responsible for or controlled any person involved, was involved in any planning, had any decision making capabilities in the network, or even knew at the time of alleged recruitment that he was involved in drug smuggling?

4. Whether a federal sentencing Court violates, *inter alia*, the Due Process rights of a criminal defendant by failing to state any reasons at all for its imposition of a sentence of incarceration and failing to state its consideration and value of the defendant's substantial assistance to the authorities?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Citations iii

Preliminary Statement 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved . . 2

Statement of the Facts 2

Proceedings Below 9

Reasons for Granting the Writ 10

Conclusion 24

Appendix A - Order of the United States Court of Appeals for the Second Circuit filed April 16, 2002 denying petition for panel rehearing. 1a-2a

Appendix B - Summary Order of the United States Court of Appeals for the Second Circuit filed March 12, 2002, affirming the sentence of the United States District Court 3a-6a

Appendix C - Judgment Including Sentence Under the Sentencing Reform Act of the United States District Court for the Eastern District of New York, dated September 7, 2001 . . . . . 7a-10a

TABLE OF CITATIONS

Rosati v. Haran,
459 F. Supp. 1148 (E.D.N.Y. 1977) 16

United States v. Cordoba-Hancapie,
825 F.Supp. 485, 521 (E.D.N.Y. 1993) 15

Unites States v. Fatico,
579 F.2d 707 (2d Cir. 1978) . . 16

United States v. Gamez,
1 F.Supp.2d 176, 180 (E.D.N.Y. 1998) 15

United States v. Herndon,
525 F.2d 208 (2d Cir. 1975) . . 16

United States v. Powell,
487 F.2d 325 (4th Cir. 1974) . . 18

United States v. Pugliese,
805 F.2d 1117 (2d Cir. 1986) . . 16

United States v. Safirstein,
827 F.2d 1380 (9th Cir. 1987) . 12

United States v. Shonubi,
103 F.3d 1085 (2d Cir. 1997) . . 15

United States v. Stein,
544 F.2d 96 (2d Cir. 1976) . . . 16

United States v. Weichert,
836 F.2d 769 (2d Cir. 1988) . . 16

United States v. Welch,
738 F.2d 863 (7th Cir. 1984) . . 18

United States v. Zackson,

6 F.3d 911 (2d Cir. 1993), *cert den'd sub nom LaGatta v. Unites States*, 512 U.S. 1224, 114 S. Ct. 2717 (1994) 19

STATUTES

18 U.S.C. §3553(e) 6, 7, 18, 19, 20, 21

21 U.S.C. §952(a) 1, 5, 6, 7

21 U.S.C. §963 7

28 U.S.C. §1254(1)(1988) 2

Fed. R. Crim. P. 32(c) 15

U.S. Const. Amend V 2

U.S.S.G. §5K1.1 . . 6, 11, 13, 14, 21, 23

MISCELLANEOUS

Susan L. Pilcher, IGNORANCE, DISCRETION AND THE FAIRNESS OF NOTICE: CONFRONTING "APPARENT INNOCENCE" IN THE CRIMINAL LAW, 35 Am.Crim.L.Rev. 1,1 (1995) 15

Fred A. Bernstein, et al., THE DENIGRATION OF MEANS REA IN DRUG SENTENCING, 7 Fed.Sen.Rep. 121, 121 (1994) 15

PRELIMINARY STATEMENT

Petitioner, Eliezer Chajmovicz, Defendant in a criminal case who was sentenced after pleading guilty to a single count information charging him with importation of MDMA into the United States in violation of 21 U.S.C. §952(a), Petitions for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit, filed on March 12, 2002, affirming his sentence of incarceration.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit filed April 16, 2002, which denied Petitioner's petition for panel rehearing, is not officially reported and is reprinted at pages 1a-2a of the appendix.

The Summary Order of the United States Court of Appeals for the Second Circuit filed March 12, 2002, affirming the sentence of the United States District Court, is not officially reported and is reprinted at pages 3a-6a of the appendix.

The Judgment Including Sentence Under the Sentencing Reform Act of the United States District Court for the Eastern District of New York (Glasser, J.), dated September 7, 2001, is not officially reported and is reprinted at pages 7a-10a of the appendix.

STATEMENT OF JURISDICTION

The Summary Order of the United States Court of Appeals for the Second

Circuit filed March 12, 2002, affirming the sentence of the United States District Court for the Eastern District of New York, was entered March 12, 2002.

Petitioner's timely petition for panel rehearing was denied by Order of the United States Court of Appeals for the Second Circuit, dated and filed April 16, 2002.

This Petition for a Writ of Certiorari is filed within ninety days of the entry of the April 16, 2002 Order of the United States Court of Appeals for the Second Circuit, denying rehearing of Petitioner's appeal.

Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1)(1988).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law . . .. U.S. Const. Amend V

STATEMENT OF THE FACTS

In early June, 1999, Petitioner Eliezer Chajmovicz approached federal authorities and agreed to provide information for the prosecution of a MDMA smuggling network which recruited numerous orthodox Jewish individuals between the ages of 18 and 20 to fly to Europe and return to New York with pre-packaged bundles containing MDMA pills. Mr.

Chajmovicz, who was nineteen (19) at the time he was approached and recruited by the network, was told, as were other couriers, that he would be transporting diamonds into the United States. His involvement in the operation occurred between February, 1999 and April, 1999.

Appellant did not know he was smuggling drugs into New York until well after he had become involved with the operation. An unemployed Yeshiva student, Mr. Chajmovicz was lured by the promise of $1,500 and a free trip to Europe for taking diamonds back to the United States. Later, after Benjamin Gratt was arrested on March 23, 1999, he found out that the smuggling operation really involved MDMA.

Appellant's function within the smuggling operation was a courier and a messenger. In February, 1999, Petitioner was first recruited by Simcha Roth to smuggle diamonds from Europe to the United States for $1,400.00. He was unable to make the trip, and recommended Aaron Fux for the trip, for which he received $200.00. Roth paid Fux directly for his expenses and gave Fux his beeper number. Later, Roth gave the Petitioner $1,400.00 to give to Fux.

Later in February, 1999, Appellant went on a smuggling trip himself, departing New York with Roth and Mayer Rosenberger. Under the directions of Sean Erez, a leader of the network, the three couriers separated. Petitioner returned to the United States alone, and successfully imported MDMA into the United States.

Following Petitioner's February, 1999 smuggling trip, Roth notified Appellant that he would receive a $200.00 finder's fee for each courier he found. Subsequently, Petitioner endorsed his cousin, Joel Chajmovicz and Cheskel Werzberger to smuggle diamonds into the United States. Acting upon directions of Roth, Petitioner delivered them airline tickets to Brussels, $400 each in spending money and a pager number to contact Levita upon their arrival to Brussels provided by Roth. When Werzberger did not receive a return call from his page in Brussels, he called the Petitioner, but was later contacted by Erez. Joel Chajmovicz returned to New York and successfully avoided detection by Customs Inspectors.

When Werzberger later returned to New York, his contact did not meet him, so he called the Petitioner, who relayed Werzberger's message to Roth. Roth sent Rosenberger to meet Werzberger at the airport.

Petitioner subsequently attempted to recruit Samuel Gratt, but failed. Samuel Gratt recruited his brother, Benjamin Gratt. Gratt was arrested on March 23, 1999 at John F. Kennedy International Airport, where inspectors seized a total of 30,125 tablets containing 8.525 net kilograms of MDMA. After his arrest, Gratt explained that he was recruited by his brother to smuggle diamonds into the United States. Gratt stated that his brother purchased his airline ticket and provided him with $400 for traveling expenses and promised to pay him $1,400.00 for a successful trip.

Finally, Wertzberger recruited Joel Gluck, who was subsequently arrested at the John F. Kennedy International Airport on March 24, 1999, where Customs Inspectors seized a total of 28,824 pills containing 8.589 net kilograms of MDMA.

Thus, Petitioner made one successful smuggling trip to Europe with what he was then told, and thought, were diamonds, right after substituting Fux for the first trip Petitioner could not make himself. Petitioner later recruited his cousin, Joel Chajmovicz and Cheskel Werzberger, and attempted to recruit Samuel Gratt.

After learning that Joel Gluck had been arrested for importing MDMA, and well before authorities had any hard evidence against him, Mr. Chajmovicz contacted an attorney in order cooperate with federal authorities to bring the entire network to justice. Petitioner, a Yeshiva student, exhibited profound shame, guilt and sorrow with respect to his becoming involved with the operation, and wished to absolve himself of his sins. Petitioner voluntarily agreed to engage in a proffer session with the government, even though he was not charged with any offense.

On July 9, 1999, Petitioner signed a Cooperation Agreement with the United States Attorney's Office. Petitioner agreed to waive indictment and plead guilty to a one-count information charging him with importation of MDMA, in violation of 21 U.S.C. §952(a).

On October 19, 1999, Petitioner waived indictment and pled guilty to a single-count information charging him with

importation of MDMA into the United States between February, 1999 and April, 1999, in violation of 21 U.S.C. §952(a), pursuant to the July 9, 1999 Cooperation Agreement entered into between the Petitioner and the United States Attorney's Office for the Eastern District of New York.

Over the course of nearly two years, Petitioner provided - information, assistance and affidavits to the U.S. Attorney's Office which led to arrests and convictions of the entire network of persons importing MDMA into the United States. Information supplied by the Petitioner was included in the affidavit in support of the arrest warrants and provided the basis for the arrest warrants. Faced with all of the evidence, which included information and affidavits provided by the Petitioner, all of the persons involved in this network pled guilty.

As agreed, the U.S. Attorney's Office submitted a letter motion, pursuant to U.S.S.G. §5K1.1 and 18 U.S.C. §3553(e), setting forth, in conclusory fashion, that Petitioner cooperated and provided substantial assistance to law enforcement authorities. The sentencing Court granted the motion, and thereby exercised its discretion to impose a sentence below the applicable Sentencing Guidelines range.

Petitioner supplied pleas for the Court's leniency, including letters from the Petitioner's family and community. The letters demonstrated that other than the instant charge, Petitioner has been, and is, a law abiding young man who is of significant value to his community.

Petitioner had already admitted his guilt voluntarily, before being approached by the authorities. He also took action to atone for his sins by cooperating with the government, without any limitations whatsoever, to bring down the network which lured him into breaking the law. Petitioner, a very religious young man, admitted his mistakes and admitted he was wrong. There was every indication that a rigid schedule of probation would be sufficient to rehabilitate Petitioner and ensure that his rehabilitation would be permanent.

On September 7, 2001, Petitioner was sentenced by the Court to a total term of eighteen (18) months imprisonment, followed by three (3) years supervised release. (7a-10a) The Court recommended that the Petitioner be designated to Shock Incarceration Program. *Id.*

At sentencing on September 7, 2001, the Court began to address Petitioner's objections to the Presentence Investigation Report. The first major objection was the report's statement that Petitioner was responsible for the importation of 268,950 pills of MDMA. Petitioner denied responsibility for any pills other than those he admitted to carrying himself. Indeed, Petitioner did not admit to conspiracy in violation of 21 U.S.C. §963, but only his own importation in violation of 21 U.S.C. §952(a). Moreover, Petitioner did not know until Gratt was arrested that the packages contained drugs, and thus, had insufficient *mens rea* to support a conspiracy charge.

Another objection was the report's portrayal of the Petitioner as a "supervisor." Indeed, the report placed great emphasis on the term "supervisor," which appears repeatedly throughout the report. The prosecution and Court's emphasis on this role allegedly played by the Petitioner was an important factor considered by the Court in its sentence of imprisonment.

However, the facts indisputably demonstrate that the Petitioner had no decision making authority, that he provided very limited participation in the importation network for just less than two (2) months, that he did not obtain a larger share of the fruits of the crime, was not paid to supervise, did not participate in the planning of the offence, and had no control over, or responsibilities for, the activities of others. Moreover, Petitioner had no management responsibility, control or decision making with respect to the network's assets, property or activities.

Rather, Petitioner acted as a courier on a single occasion, and asked a few friends or family members to smuggle what he thought were diamonds into the United States, in order to receive $200.00 per person. At the behest of his superiors, Petitioner delivered payments and airline tickets to some of his fellow couriers. The record is devoid of any suggestion that Petitioner purchased airline tickets or made any decisions or conducted any planning whatsoever. Rather, the facts only establish that Petitioner was a courier on one occasion, thinking he was smuggling diamonds into the United States,

and later, acted as a messenger to deliver tickets or money.

Finally, Petitioner's major role in cooperating and assisting the government, which helped the government bring down the entire network and secure guilty pleas from all of the defendants, was completely absent from Petitioner's presentence investigation report, which was not significantly updated from December, 1999. Petitioner's cooperation over the course of nearly two (2) years was not sufficiently brought to the attention of the Court, as agreed in the Cooperation Agreement.

Nor did the Court make an appropriate evaluation of the significance and usefulness of the Petitioner's assistance or state such reasons at the sentencing or in the Judgment Including Sentence Under the Sentencing Reform Act, including the Court's and government's evaluation of the significance and usefulness of Petitioner's assistance; the truthfulness, completeness and reliability of information provided by Petitioner; the nature and extent of Petitioner's assistance; the potential danger to Petitioner or his family from his assistance; and the timeliness of Petitioner's assistance.

THE PROCEEDINGS BELOW

Mr. Chajmovicz appealed the sentence rendered by the United States District Court for the Eastern District of New York (Glasser, J.), to the United States Court of Appeals for the Second Circuit. Petitioner asserted, *inter alia*, that the

information contained in his Presentence Investigation Report was incorrect and/or unreliable, and the sentencing Court's wholesale adoption of its conclusions, in the face of disputed issues, deprived him of, *inter alia*, due process. Mr. Chajmovicz argued, in essence, that the Court imposed an undetected offset to what would have been a deeper downward departure or used an inflated base offense level as a point of departure, which adversely affected the level of departure.

The Second Circuit unanimously affirmed, adopting the District Court's heretofore unexplained finding that Petitioner was a "supervisor" under the sentencing guidelines, as well as the Government's estimation and imputation of the quantity of MDMA pills to Petitioner, which estimation was contradicted by the Government's own seizure, while remaining silent on other important issues advanced by Petitioner.

Petitioner timely filed a petition for rehearing with the Second Circuit, which was denied on April 16, 2002.

REASONS FOR GRANTING WRIT

THE EXTENT AND DEGREE TO WHICH UNRELIABLE AND/OR UNSUPPORTED ALLEGATIONS OF "RELEVANT CONDUCT" IN A PRESENTENCE INVESTIGATION REPORT MAY BE EMPLOYED TO ENHANCE A DEFENDANT'S OFFENSE LEVEL PRIOR TO DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES, SHOULD BE ADDRESSED BY THIS COURT.

Certiorari is sought to address several important issues concerning due

process rights of criminal defendants at the sentencing stage of criminal proceedings in federal courts.

Specifically, the instant case involves a situation in which the Defendant pled guilty to a single count information charging him with the importation of MDMA into the United States. Petitioner, after waiving indictment and pleading guilty to the one count information, continued over the course of some two years, to cooperate with authorities and bring an entire drug smuggling network to justice.

Unfortunately, the Government's Presentence Investigation Report said little, if anything, about Petitioner's substantial assistance, and was never updated to include his assistance in the two years following his guilty plea. Moreover, the Presentence Investigation Report, wrongfully characterized Petitioner as a "supervisor" in the smuggling network, despite reliable supporting evidence, other than his recruitment of other fellow couriers, to support such a claim. It remained undisputed that Petitioner did not supervise, direct, control or have any power superior to his fellow couriers.

The characterization of Petitioner as a "supervisor" had a twofold impact on Petitioner's offense levels. First, Petitioner received a three level increase for his alleged role as a "supervisor" pursuant to U.S.S.G. §3B1.1.

Secondly, the Government and the Court proceeded to impute to Petitioner

the importation of 268,950 pills of MDMA into the United States, based upon his alleged role.

The imputation of 268,950 MDMA pills to Petitioner was achieved despite the fact that it remained undisputed that Petitioner was told, and thought, that he was smuggling diamonds, not drugs, into the United States, and likewise, he had "recruited" individuals for the purpose of smuggling diamonds. The Government's case for "relevant conduct" was bereft of a scintilla of evidence to support their conspiracy claims against Petitioner. *See, e.g., United States v. Safirstein*, 827 F.2d 1380, 1385 (9th Cir. 1987)(cautioning against use of unreliable information or making "unfounded assumptions or groundless inferences" based upon accurate information for sentencing purposes.)

Unfortunately, the Court adopted the Government's unsupported accusations and calculations, permitting the "relevant conduct" tail to wag the "offense of conviction" dog, a circumstance which clearly calls for caution, in the absence of credible proof from the Government.

The use of "relevant conduct" in sentencing a criminal defendant, based largely, if not solely, upon information in a Presentence Investigation Report, violates due process where, as here, the information contained therein is, at best, unreliable, and the Government offers no credible evidence to support the increase in offense level based upon conduct which is outside the offense of conviction.

While the district courts are permitted wide discretion in choosing what facts and factors to consider in rendering sentences, this Court should provide guidance as to the requisite support for such information, and the Government's burden to support such information with reliable evidence before it may be used against a criminal defendant as "relevant conduct," to increase the defendant's offense level.

POINT I

THE SECOND CIRCUIT'S SUMMARY ORDER FAILED TO ADDRESS THE ABSENCE OF EVIDENCE OF *MENS REA* TO SUPPORT PETITIONER'S ALLEGED "RELEVANT CONDUCT," WHICH PROVIDED THE MAJORITY OF THE OFFENSE LEVEL FROM WHICH THE DISTRICT COURT DEPARTED.

The Second Circuit's Summary Order, entered Mar 12, 2002, did not address the Government's failure to prove, by a preponderance, Petitioner's *mens rea* sufficient to support the Government's claims of relevant conduct, which significantly inflated Petitioner's offense levels before the District Court granted the Government's §5K1.1 letter and departed below the sentencing guidelines.

Petitioner has always maintained, and the Government concedes, that he was told, and believed, that he was smuggling diamonds into the United States, not drugs. Indeed, the Government itself acknowledged that the couriers were routinely told that they would be smuggling diamonds, a concept that is not far-fetched for young orthodox Jewish men from the Brooklyn community.

In its Brief, as before the District Court, the Government avoided the issue of Petitioner's knowledge. While the Government conceded that Petitioner and the other orthodox Jewish couriers were routinely told that they were smuggling diamonds, the Government claimed "there were warning signs that put the couriers on notice of the truth." Brief and Appendix for the United States, at 3 (citing the Government's own §5K1.1 letter). The record remains completely silent as to any evidence supporting the alleged "warning signs," who allegedly received such signs, or when they were allegedly received.

In fact, the prosecutor noted that upon Gratt's arrest, "this defendant called up Roth and said: Did you know this was drugs . . . ." [A. 89][1] The prosecutor attributed this telephone call to "denial," and stated, without any support, that "he clearly knew." *Id.*, *see also* Statement of Defense Counsel [A. 68] "never in a million years did he think that he actually dealt with ecstacy at the time."

When the District Court asked Petitioner whether he knew what he was doing was wrong, the Petitioner maintained that he did not know he was smuggling drugs until Gratt was arrested, after the time frame for importation to which Petitioner pled guilty. [A. 90-92].

---

[1] Citations to "A." refer to the Appendix of Defendant-Appellant submitted to the United States Court of Appeals for the Second Circuit.

The District Court's failure to address and resolve the lack of evidence of Petitioner's *mens rea*, before accepting the recommended offense level of thirty-two, presents a substantial violation of due process and Fed.R.Crim.P. 32(c), which requires the Court to rule on the unresolved objections to the presentence report and make a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account, or will not affect, sentencing. Fed.R.Crim.P. 32(c).

The Government must be required to prove, albeit by a preponderance, *mens rea* to support the relevant conduct of criminal defendants at sentencing. *See, e.g. United States v. Gamez*, 1 F.Supp.2d 176, 180 (E.D.N.Y. 1998)(citing Susan L. Pilcher, IGNORANCE, DISCRETION AND THE FAIRNESS OF NOTICE: CONFRONTING "APPARENT INNOCENCE" IN THE CRIMINAL LAW, 35 Am.Crim.L.Rev. 1,1 (1995); *United States v. Cordoba-Hancapie*, 825 F.Supp. 485, 521 (E.D.N.Y. 1993); Fred A. Bernstein, et al., THE DENIGRATION OF MEANS REA IN DRUG SENTENCING, 7 Fed.Sen.Rep. 121, 121 (1994).)

It bears emphasis that a significant portion of Petitioner's base offense level, accounting for nearly two-thirds of his potential sentence, was supplied by relevant conduct, not the offense of conviction. In effect, the "relevant conduct" tail is wagging the "offense of conviction" dog, a circumstance which clearly calls for, *inter alia*, the caution espoused by the Second Circuit in *United States v. Shonubi*, 103 F.3d 1085, 1092 (2d Cir. 1997)(recognizing that imputation of

MDMA imported by others under "relevant conduct," as a "distinction [which] warrants caution . . .")

Due to the Government's failure to satisfy its burden of proving relevant conduct, the District Court's adoption of the base level of 32 as a departure point was unlawful and a violation of due process. *See e.g., Rosati v. Haran*, 459 F.Supp. 1148, 1155 (E.D.N.Y. 1977)(acknowledging that the *Townsend* rationale has been construed to mean that 'material false assumptions as to any facts relevant to sentencing' and not merely misconceptions about the Petitioner's prior criminal record will render 'the entire sentencing procedure invalid as a violation of due process.')(citing *United States v. Malcolm*, 432 F.2d 809, 816; *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Herndon*, 525 F.2d 208 (2d Cir. 1975); *see also U.S. v. Weichert*, 836 F.2d 769 (2d Cir. 1988)(recognizing the importance of resolving disputed information in presentence investigation reports, or stating that unresolved information will not be considered by the Court.); *U.S. v. Pugliese*, 805 F.2d 1117 (2d Cir. 1986); *U.S. v. Fatico*, 579 F.2d 707 (2d Cir. 1978).

In *Pugliese, supra*, the Second Circuit held that "the district court's failure to ascertain the reliability and accuracy of the presentence reports constitutes plain error and is also an abuse of discretion that mandates reversal of the sentences." *Id.*, at 1124.

Here, the District Court, while granting the prosecution's motion pursuant to 5K1.1 and departing downward from sentencing guidelines, concluded, without addressing the objections, that the "calculation of the guidelines is entirely correct," and thus, considered the total offense level of 32 as the point of departure.

Due to the Court's failure to address and determine unresolved disputes with the Presentence Investigation Report, Petitioner was subjected to an inflated total offense level, which likely offset the reduction by the sentencing Court.

The Second Circuit's determination entered March 12, 2002 does not address Petitioner's knowledge, or lack thereof, to support his relevant conduct at sentencing. While the Court accepted and affirmed Petitioner's role as a "supervisor" based upon his recruitment of a handful of couriers, the record is silent as to exactly what Petitioner recruited the couriers for, as the is no evidence that Petitioner knew he was involved in smuggling drugs, but rather, he was told and thought that he was smuggling diamonds into the United States.

The issue of whether an intent to smuggle diamonds, a category completely different from controlled substances, may be transferred or used to support participation in drug importation as relevant conduct at sentencing remains unresolved, and should be addressed by this Court.

Finally, the Government's estimate of

the quantity of MDMA pills to impute to Petitioner, buttressed only by the Government's unsupported claim that the couriers typically carried 30,000 pills, was unreliable, and belied by the Government's seizure of 28,824 in the arrest of Joel Gluck, March 24, 1999, at John F. Kennedy International Airport. No specific evidence concerning the couriers' alleged carries was provided by the Government, and the imputation of 268,950 pills of MDMA to Petitioner was unfounded, arbitrary, and inherently unreliable. *See, e.g., United States v. Powell*, 487 F.2d 325 (4th Cir. 1974); *United States v. Welch*, 738 F.2d 863 (7th Cir. 1984).

It bears emphasis that the information, upon which Petitioner pled guilty, did not specify any quantity of MDMA imported by Petitioner, and moreover, Petitioner vehemently objected to the imputation of 268,950 pills of MDMA to him at sentencing. The sentencing Court's acceptance, over objection of the Government's imputation of 268,950 pills of MDMA to Petitioner, in the absence of credible evidence supporting same, violates, *inter alia*, due process.

POINT II

THE SECOND CIRCUIT SHOULD HAVE REMANDED FOR RESENTENCING, BASED UPON THE DISTRICT COURT'S FAILURE TO STATE IN OPEN COURT THE REASONS FOR ITS IMPOSITION OF THE SENTENCE OF INCARCERATION.

The District Court failed to state in open Court the reasons for its imposition of the particular sentence, in violation of 18 U.S.C. §3553, adding to Petitioner's

difficulties in proving the sentencing Court's reliance on the inaccurate and incomplete information provided by the Government.

Section 3553 specifies the factors that a sentencing judge must consider in determining the particular sentence to be imposed, and also requires an articulation of the reasons for imposing a sentence. 18 U.S.C. §3553. In *United States v. Zackson*, 6 F.3d 911 (2d Cir. 1993), *cert den'd, sub nom LaGatta v. U.S.*, 512 U.S. 1224, 114 S.Ct. 2717 (1994), the Second Circuit held:

> we believe the imposition of a sentence without an articulation of reasons, even one briefly stated, is a sentence imposed in violation of law unless and until supported by a statement of adequate reasons. *Id.*, at 923-24.

In the instant case, the Court provided no reasons for its decision to incarcerate Petitioner, whose participation in the MDMA importation network was minimal and who sought out and cooperated with authorities "at the earliest possible moment." (A. 89).

Rather, the Court simply stated:

> I'm going to grant the government's motion pursuant to 5K1 but I'm going to commit Mr. Chajmovicz to the custody of the Attorney General for a period of 18 months with a recommendation pursuant to Section 446 of Title 18 of the United States Code

> that he be placed in the shock incarceration program; three years of supervised release; 100-dollar special assessment. (A. 97)

The sentencing judge gave no explanation as to why he chose to incarcerate the Petitioner. Notably, Benjamin Gratt, another defendant who was arrested while attempting to import a single shipment of MDMA was sentenced to a day custody and 3 years supervised release. There is no explanation or evidence that the sentencing Court considered the sentence disparities between Mr. Chajmovicz, who was just slightly more involved than Mr. Gratt, and did not get caught, but voluntarily approached authorities with information at the earliest possible moment and provided substantial cooperation for nearly two (2) years. *See e.g.*, 18 U.S.C. §3553(a)(6).

Without an explanation as to why the sentencing judge chose to incarcerate the Petitioner, the sentence is unlawful and should have been remanded.

Indeed, the majority of Petitioner's questioning by the District Court involved Petitioner's finances, his lack of full-time work and his debt owed to credit card companies (A. 92-97), an unusual basis for the Court to determine whether or not incarceration is necessary.

Notably, the sentencing Court's failure to enunciate the reasons why it imposed the aforementioned sentence of incarceration leaves Petitioner unable to demonstrate the impact that the inflated

base offense level, as a point of departure, had upon his sentence, resulting in significant and unfair prejudice to Petitioner.

The Second Circuit's Summary Order entered March 12, 2002, did not address the District Court's failure to state, on the record, the reasoning for its imposition of the sentence of incarceration. As this failure of the District Court renders the sentence unlawful, this Court should exercise jurisdiction in order to implement 18 U.S.C. §3553 and encourage federal sentencing courts to provide reasons, on the record, for the imposition of sentences of imprisonment.

POINT III

THE SECOND CIRCUIT SHOULD HAVE REMANDED FOR RESENTENCING BASED UPON THE SENTENCING COURT'S FAILURE TO STATE THE REASONS FOR THE DEPARTURE AND REDUCTION PURSUANT TO U.S.S.G. §5K1.1, AND ITS FAILURE TO CONSIDER ON THE RECORD THE VALUE OF PETITIONER'S SUBSTANTIAL ASSISTANCE.

The sentencing Court similarly failed to state reasons or its consideration of the factors enunciated in U.S.S.G. §5K1.1 in determining its departure from the Guidelines or the reduction granted by the Court.

While Petitioner appreciates that the Court granted the prosecution's 5K1.1 motion and departed downward from sentencing guidelines, the departure was unreasonable, as the Court did not explain, and apparently did not seriously

consider, *inter alia*, that probation would be sufficient for Petitioner's rehabilitation under these circumstances.

As noted above, Petitioner's assistance led to the successful prosecution of the entire MDMA importation network. Petitioner cooperated with authorities from the "earliest possible moment," and gave truthful and useful information which secured guilty pleas from all of the members of the network.

The sentencing court side-stepped the entire consideration of Petitioner's assistance, and minimized its consideration of Petitioner's considerable and substantial assistance provided to authorities, the risks involved, the timeliness of Petitioner's approach of authorities and the impact that Petitioner's assistance had upon his ability to rehabilitate.

In the Government's Appendix submitted with its Brief, which consisted of a conversation between defense counsel and the District Court on October 15, 2001 (more then one month after sentencing), the District Court stated, *inter alia*:

> I know more about the kind, extent and nature of cooperation that was provided to the government in this case than you could possibly know, because you haven't been involved in sentencing. [GA. 6]

However, the knowledge of the District Court was not imparted to defense counsel or placed on the record, depriving

Petitioner of vital due process rights. The Federal Sentencing Guidelines, §5K1.1 requires the court to determine "for reasons stated [emphasis added]" the appropriate reduction. Relying upon a District Court's secret knowledge of the Petitioner's cooperation will not suffice, and violates the letter and spirit of §5K1.1.

When a sentencing Court has unimparted knowledge of the value of a Petitioner's substantial assistance to authorities which is not placed on the record, defense counsel has no opportunity to ensure the accuracy of the Court's impressions, no opportunity to object to any incomplete or inaccurate information and no opportunity to assure his or her client that the full value of the Petitioner's assistance is properly taken into account by the Court.

The Petitioner's due process rights are served only by placing such matters in the Presentence Investigation Report and/or on the record, where such facts may be learned, clarified or challenged by Petitioner and his counsel. The District Court's later revealed personal knowledge of Petitioner's cooperation in the instant case, which the Court itself recognized defense counsel was not "involved in," is an invalid substitute for notice and an opportunity to be heard on the facts and issues at the time of sentencing.

The sentencing Court's failure to address, at all, Petitioner's substantial assistance deprived Petitioner of a meaningful assessment of his conduct, character and benefit of his assistance,

and likely adversely affected his sentence of incarceration.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

ROBERT E. SOKOLSKI, ESQ.
Counsel for Petitioner
305 Broadway - Suite 402
New York, New York 10007
(212) 571-4090

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of April two thousand two.

Present:

Hon. Guido Calabresi,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzman,

CIRCUIT JUDGES,

USA,

Appellee,

Docket No. 01-1496

v

Chajmovicz,

Defendant-Appellant,

A petition for panel rehearing having been filed herein by Eliezer Chajmovicz,

Upon Consideration thereof, it is Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By:_____
Arthur M. Heller
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of March, two thousand and two.

PRESENT:

HON. GUIDO CALABRESI,
HON. JOSÉ A. CABRANES
HON. ROBERT A. KATZMAN,
Circuit Judges

OFFICIAL STAMP
FILED MAR 12 2002

UNITED STATES OF AMERICA,

Appellee,

SUMMARY ORDER
#01-1496

v

ELIEZER CHAJMOVICZ,

Defendant-Appellant.

For Appellee: LINDA A. LACEWELL, Assistant United States Attorney (Peter A. Norling United States Attorney, Alan Vinegrad, United States Attorney, on the brief), E.D.N.Y., Brooklyn, N.Y.

For Defendant-Appellant: ROBERT E. SOKOLSKI, N.Y., (Meir Moza, Mineola, N.Y. on the brief)

Appeal from the United States District Court for the Eastern District of New York (Glasser, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

In February 1999, Eliezer Chajmovicz recruited a network of individuals smuggling MDMA (commonly known as "ecstasy") from Europe into the United States. During February and March of 1999, Chajmovicz made one smuggling trip himself, and recruited three others to take similar trips. One of these recruits, on Chamovicz's behalf, recruited three additional couriers. Chajmovicz provided some of these individuals with airline tickets and spending money for their trips, as well as a beeper number contact in Europe. In March 1999, two couriers recruited by Chajmovicz were caught reentering the United States with MDMA tablets. At this point, Chajmovicz contacted an attorney and agreed to cooperate with the government. In a series of proffer sessions, Chajmovicz provided information to the government about his own involvement in the

smuggling network and the involvement of others. Chajmovicz later pleaded guilty to one count of importation of MDMA, in violation of 21 U.S.C.§ 952(a). The government agreed to write a U.S.S.G. § 5K1.1 letter informing the sentencing judge of Chajmovicz's assistance.

The presentence report ("PSR") found Chajmovicz to be responsible for the importation of 268,950 MDMA tablets. This drug quantity was based on the amounts seized from the two couriers as well as estimated amounts smuggled by Chajmovicz, two other couriers who had traveled with him to Europe, and other couriers Chajmovicz had recruited. *See* U.S.S.G. § 1B1.3. The PSR also recommended a three-level enhancement for Chajmovicz's role in the offense, pursuant to U.S.S.G § 3B1.1, and a three-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. The total recommended offense level was thirty two, which carries a range of imprisonment of one hundred twenty-one to one hundred fifty-one months. The District court adopted the guideline calculations and the recommendations of the PSR and departed downward on the basis of the government's § 5K1.1 letter to a sentence of eighteen months of imprisonment, with a recommendation that Chajmovicz be placed in the Shock Incarceration Program. The court also sentenced Chajmovicz to three years of supervised release.

On appeal, Chajmovicz argues primarily that the district court erred in imposing an enhancement for his role in the offense and in its determination of the drug quantities for which he was responsible. As the district court noted, the PSR correctly determined the quantity of drugs attributable to Chajmovicz. *See* U.S.S.G. 2D1.1 cmt, application note 12 ("Where there is no drug seizure..., the court shall approximate the quantity of the controlled substance.") *United States v. Miller*, 116 F.3d 641, 684 (2d Cir. 1997)("[T]he quantity of narcotics attributable to a given defendant may be approximated...."), *see also United States v. Shonubi*, 103 F.3d 1085, 1090-92 (2d Cir. 1997)(requiring

district courts to base any estimate of drug quantity on "specific evidence" about the quantity for which a given defendant is responsible, including drug records, admissions, live testimony, and the like), *see also United States v. Chalarca*, 95 F.3d 239, 243 (2d Cir. 1996); *United States v. Perrone*, 936 F.2d 1403, 1416-17 (2d Cir. 1991). The district court also properly found that, given Chajmovicz's hiring and managing of participants in the smuggling network, a three-level enhancement under §3B1.1 was appropriate.

We have considered all of the appellant's other arguments and find them to be meritless. Accordingly, we AFFIRM the sentence of the district court.

ROSEANN B. MACKECHNIE,
Clerk

by: Lucille Carr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

JUDGMENT INCLUDING
SENTENCE UNDER HE
SENTENCING REFORM ACT
Case Number #CR 99-929

vs-

ELIEZER CHAJMOVICZ

Defendant's attorney:
Meir Mozar

----------X

The defendant pled guilty to count #1 of an information.

Accordingly, the defendant is ADJUDGED, guilty of such counts, which involves the following offenses:

Title & Section	Nature & Offense	Count Number
21 USC, sec 952(a) and 960(b)(3).	Importation of MDMA	#1

The defendant is sentenced as provided in pages 2 through 4 of this judgment.

The sentence is imposed pursuant to the Sentencing Reform act of 1984 and upon motion of the government for a downward departure.

The mandatory special assessment is included in the portion of this judgment that imposes a fine.

It is ordered that the defendant shall pay to the United States a Special assessment of $100.00, which shall be due

immediately.

It is ordered that defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. # 113-66-0049

September 7, 2001

Defendant's address:

Date of Imposition of sentence

115 Penn Street
Brooklyn, New York 11211

I Leo Glasser, U.S.D.J.
Name & Title of Judicial Officer
A TRUE COPY ATTEST
DATED: s/ Sept. 7, 2001
ROBERT C. HEINEMANN
Clerk
by: s/ Louise Schillet
DEPUTY CLERK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of (18) months.

The court recommends that the defendant be designated to Shock Incarceration Program, pursuant to 4046 of Title 18.

The defendant is remanded to the custody of the U.S. Marshal.

The defendant shall surrender for service of sentence at the institute designated by the Bureau of Prisons:

before 2 P.M. on October 15, 2001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for three years.

While on supervised release, the defendant shall not commit another Federal, State of local crime and shall comply with the standard conditions that have been adopted by this Court (set forth on the following page). If this supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this judgment:

The defendant shall not commit another Federal, state of local crime; the defendant shall not leave the judicial district without the permission of the court or probation officer; the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month; the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer; the defendant shall support his or her dependents and meet other family responsibilities; the defendant shall work regularly at a gainful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons; the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment; the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician; the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered; the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer; the defendant shall permit the probation officer to visit him or her at ant time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer; the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer; the defendant shall not enter into an agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.